through,[52] commercial limits on children's programming,[53] implementation of a national emergency alert system,[54] and protection of subscriber privacy.[55]

In addition, the Commission should take steps to equalize the FCC regulatory fees paid by DBS providers and cable operators. Most cable operators pay two separate types of annual FCC regulatory fees,[56] a cable system fee assessed on a per-subscriber basis, as well as a license fee assessed on each FCC license used in connection with the operation of the cable system, such as cable television relay service ("CARS") licenses and business radio licenses.[57] In contrast, DBS operators are assessed only one category of annual regulatory fee -- a license fee in connection with each operational DBS station. In fiscal year ("FY") 1996, cable system operators paid over $34 million in per-subscriber FCC regulatory fees alone,[58] while DBS operators and providers were assessed a total of a mere $282,000 in

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[52]47 U.S.C. § 543(b)(8).

[53]Pub. L. 101-437, 104 Stat. 996-1000 (1990).

[54]Report and Order and Further Notice of Proposed Rulemaking in FO Docket Nos. 91-301 & 91-171, 10 FCC Rcd 1786 (1994).

[55]47 U.S.C. § 551.

[56]See 47 U.S.C. § 159.

[57]Cable operators use CARS facilities to receive and transmit programming via microwave and business radios to communicate with trucks in the field.

[58]According to the Commission's FY 1996 cable television regulatory fees, cable operators paid $.55 for each of their subscribers as of December 31, 1995. See Public Notice (64273) (released Aug. 5, 1996). Also according to the Commission, the cable industry had 62.1 million subscribers at the end of 1995. Third Annual Report, *supra*, at ¶ 14. Thus, cable operators paid $34.155 million ($.55 times 62.1 million subscribers) in annual subscriber fees in FY 1996. Note that the $34 million does not include the annual regulatory fees paid for various licenses held.

regulatory fees.[59] DBS operators and providers should be assessed annual regulatory fees similar to those imposed upon cable operators as follows: (1) DBS licensees should pay FCC regulatory fees for each licensed station and (2) DBS service providers should pay FCC regulatory fees for each DBS subscriber served, at an amount equivalent to that paid by cable operators, *i.e.*, $.55 per subscriber per year.

### B. DBS Providers Seeking The Benefits Of Local Broadcast Station Carriage Should Assume The Attendant Regulatory Responsibilities.

Under the current copyright law, DBS providers may not take advantage of the compulsory copyright license to retransmit a network television station into any area where the signal from any affiliate of that network is available over-the-air.[60] However, certain DBS providers are actively seeking legislative changes to the Copyright Act to permit the retransmission of local broadcast signals. Moreover, technology has developed so that DBS providers may soon have the ability to offer retransmission of local television broadcast stations to their subscribers on a geographically discrete basis. The use of multiple satellites, spot-beam satellite transmission and advanced compression technologies such as MPEG-2 could enable DBS providers to uplink and retransmit local broadcasts on a regional basis.[61]

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[59]"Entities authorized to operate . . . direct broadcast satellites . . . whose licenses were granted on or before October 1, 1995 [were required to pay] . . . $70,575 per operational station." Public Notice (64271) (released Aug. 5, 1996). DIRECTV, Inc. and United States Satellite Broadcasting ("USSB") are the only DBS licensees to have had licensed stations in operation on or before October 1, 1995. Therefore, DIRECTV made FY 1996 regulatory fee payments amounting to $211,725 and USSB paid $70,575 in regulatory fees. See FCC Collection System, Payment Type Code by Lock Box, Code: CSG6 at 1 (from September 1, 1996 to November 30, 1996).

[60]See 17 U.S.C. §§ 119(a)(2)(B), (d)(2) and (d)(10).

[61]See Glen Dickson, "SKY to Put Stations on the Spot (Beam)," Broadcasting and Cable, Mar. 17, 1997, at 34-35.

This regional retransmission of broadcast signals will surely provide a great competitive benefit to DBS systems.

One DBS service provider has already announced its intention to aggregate DBS channels in order to provide local broadcast service to television markets across the country using this new technology. As noted earlier, on February 24, 1997, News Corp., an Australian corporation, announced that it had entered into a binding agreement to contribute the assets of ASkyB, a satellite venture with MCI Communications Corporation ("MCI"), for a 50 percent stake in a new joint venture with EchoStar to be called "SKY."[62] SKY plans to provide not only traditional cable network programming and near-video-on-demand movies to its DBS subscribers, but also a complement of local television broadcast signals on a selective market-by-market basis.

SKY reportedly expects to have four operational satellites in orbit covering the continental U.S., two in orbit at 119 degrees west longitude and two at 110 degrees west longitude, by the spring of 1998. Between the two orbital slots, SKY will control 50 satellite transponders.[63] With the help of digital signal compression at a 10:1 ratio and a novel, untested satellite dish technology, SKY expects to deliver 500 channels over those 50 satellite transponders, enabling it to set aside enough channels to beam local television broadcast

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[62]SEC Form 8-K, Exhibit A, filed by EchoStar Communications Corporation, as of Mar. 3, 1997. See also Cynthia Littleton, "Murdoch, Ergen take to SKY," Broadcasting & Cable, Mar. 3, 1997, at 41-42.

[63]See "Local Retransmission: Pie in the SKY?," Broadcasting & Cable, Mar. 3, 1997, at 42. The 50 satellite transponders available to the SKY joint venture result from combining the 28 transponders licensed to MCI at 110 degrees west longitude, the 21 transponders licensed to EchoStar at 119 degrees west longitude, and the one transponder licensed to EchoStar at 110 degrees west longitude. See "Murdoch Plan Signals Issues for Regulators," USA Today, Mar. 5, 1997.

signals into 50 percent of U.S. television homes. In late 1998, SKY plans to launch a spot-beam satellite into orbit which SKY claims would enable it to attain local broadcast coverage of a full 75 percent of U.S. television homes.[64] If SKY's proposed operation is successful, it can be expected that other DBS service providers may seek to provide such regional service, including the carriage of local broadcast signals at least in some ADIs, in order to remain competitive.

Substantial regulatory requirements are imposed on cable television operators in connection with the retransmission of television broadcast stations. Where a DBS provider seeks the benefits of local broadcast station carriage, such DBS provider should be required to assume the attendant regulatory responsibilities.

**1. Mandatory Broadcast Carriage Requirements.**

If a DBS service provider elects to carry any broadcast station locally, it must be subject to mandatory carriage requirements within that station's ADI which are at least equivalent to those now applicable to cable operators.[65] Section 614 of the Communications Act requires a cable system with more than 12 usable activated channels to carry the signals of qualified local commercial television stations on up to one-third of its usable activated channels.[66] Section 615 of the Communications Act further requires every cable operator to carry the signal of at least one local non-commercial educational station, and operators with

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[64]See "Local Retransmission: Pie in the SKY?," Broadcasting & Cable, Mar. 3, 1997, at 42.

[65]Naturally, the DMA would apply when that measure takes effect for cable television must-carry purposes.

[66]47 U.S.C. § 534(b)(1)(B). In certain cases this requirement includes qualified low power television stations as well.

more than 36 usable activated channels are required to carry the signal of every such station.[67] Although certain exceptions exist for duplicative programming schedules, at least three local non-commercial stations are guaranteed carriage, even if duplicative.[68]

### a. Mandatory Carriage Requirements Would Serve The Congressional Goals Underlying Must-Carry

On March 31, 1997, the Supreme Court upheld the constitutionality of the cable must-carry provisions.[69] A majority of the Court found that these requirements served the important governmental interest of preserving the benefits of free, over-the-air local broadcast television and, by doing so, promoting the widespread dissemination of information from a multiplicity of sources.[70] Imposing mandatory carriage requirements on DBS providers in the ADIs where they choose to provide any local broadcast carriage would clearly promote the continued viability of free, over-the-air television. As described by Justice Breyer, whose concurrence formed the Court's majority:

> [w]hether or not the statute does or does not sensibly compensate for some significant market defect, it undoubtedly seeks to provide over-the-air viewers who lack cable with a rich mix of over-the-air programming by guaranteeing the over-the-air stations that provide such programming with the extra dollars that an additional cable audience will generate.
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[67]47 U.S.C. § 535.

[68]Id.

[69]Turner Broadcasting System, Inc. v. FCC, Case No. 95-992, 1997 U.S. LEXIS 2078, decided Mar. 31, 1997 ("Turner Broadcasting"). Time Warner Cable was a party to this constitutional challenge.

[70]Id. at 19, citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994) ("Turner I"); and 80-81 (concurring opinion of Justice Breyer).

> The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public. . . .[71]

In adopting the statutory must-carry requirements in the 1992 Cable Act, Congress repeatedly emphasized the importance it placed on local, off-air television stations and the programming they originate. First, the legislative history to the 1992 Cable Act stressed the importance of protecting the existing scheme of television allotments and the goals underlying it. According to the 1992 Cable Act's Conference Report:

> The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.[72]

The 1992 Conference Report further stated that "[t]he conferees find that the must-carry and channel positioning provisions in the bill are the only means to protect the federal

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[71]Id. at 81-83 (citations omitted), quoting Turner I, 512 U.S. at 663. Indeed, the Court in Turner Broadcasting rejected the suggestion that Congress' interest in assuring the public's access to television broadcasting "extends only as far as preserving 'a minimum amount of television broadcast service.'" Id. at 21 (quoting from briefs).

[72]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 3 (1992) ("1992 Conference Report"). See also Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864 (1986), Concurring Statement of Commissioner Quello at 912 ("The most obvious shortcoming of our Order is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities").

system of television allocations . . . ."[73] Similarly, the 1992 Cable Act's House Report articulated that:

> From the early days of cable development, the FCC was concerned that the ability of cable operators to choose to carry or not to carry particular local television stations would permit cable operators unilaterally to recast the FCC's carefully established allocation system for local television service.[74]

Next, the legislative history emphasized the benefits of local programming on television stations, including news and public affairs, which were closely related to the goals of the Section 307(b) allotment scheme. According to the 1992 Conference Report:

> A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.
>
> Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.[75]

Furthermore, the 1992 House Report recognized that:

> Title III of the Communications Act reflects the importance which Congress placed on the development of a competitive system of over-the-air broadcasting, an intent which the FCC recognized in allocating significant amounts of scarce radio frequency spectrum to broadcasting and creating its Table of Allocations to ensure the widest distribution of local television service. Local television stations are central to this public purpose -- they are both the leading source of news and public affairs information for a majority of Americans . . . and the most popular entertainment medium.[76]

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[73]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 75 (1992).

[74]H.R. Rep. No. 628, 102d Cong., 2d Sess. 47 (1992) ("1992 House Report").

[75]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 3 (1992).

[76]H.R. Rep. No. 628, 102d Cong., 2d Sess. 50 (1992) (footnote omitted).

In addition to the local service provided by broadcast stations, Congress recognized the public interest benefits of free programming services to those who did not subscribe to any MVPD:

> Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.[77]

Congress was concerned that broadcast stations that lost substantial portions of their audience would be unable to continue to provide local public service programming, or would be forced to discontinue service altogether. As a result, the forty percent of American television households that receive television service only off-air would be deprived of a free, over-the-air, local program service.[78] The Committee emphasized that:

> its concerns are not limited to a situation where stations are dropped wholesale by large numbers of cable systems. The incremental weakening of local broadcasters that results from being dropped across a portion of their market, or by discriminatory carriage conditions, will result in those stations' losing their ability to compete in a competitive programming market.[79]

The imposition of mandatory carriage requirements on DBS operators that elect to carry any local broadcast station in that station's ADI/DMA would similarly serve the Congressional goals of promoting free, off-air television service, and thus the widespread

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[77]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 3 (1992).

[78]Id. at 64.

[79]Id.

dissemination of information broadcast by such stations. Such carriage would protect the existing allotments of television stations, help to preserve local program service, and protect the level of broadcast service enjoyed by viewers who do not subscribe to any MVPD. Mandatory carriage of educational stations would further the same important governmental goals.[80]

**b. Mandatory Carriage Requirements Would Provide Regulatory Parity.**

Apart from the particular policy goals underlying must-carry, the interests of regulatory parity and administrative fairness require the imposition of equivalent carriage requirements on DBS, to the extent that it provides a local broadcast service, in order to ensure a level playing field in those ADI/DMAs. Indeed, the Commission has already imposed television station carriage requirements on OVS, another MVPD that carries local broadcast signals and provides service analogous to a traditional cable operator. The 1996 Act required the FCC to impose obligations on OVS providers "that are no greater or lesser" than the commercial and non-commercial must-carry requirements imposed on cable operators by Sections 614 and 615 of the Communications Act.[81] Section 76.1506(e) of the Commission's rules thus extends to OVS operators the carriage obligations imposed on cable operators by Section 76.56 of the Commission's rules.[82] This 1996 Act requirement clearly reflects Congressional intent to impose regulatory parity on a similarly-situated MVPD with

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[80]See *e.g.*, id. at 2-3.

[81]47 U.S.C. §§ 573(c)(1)(B) & (2)(A).

[82]47 C.F.R. § 76.1506(e).

respect to television signal carriage obligations. Indeed, carriage requirements were imposed despite express Congressional intent to minimize regulatory burdens on OVS operators.[83]

Time Warner Cable understands the concerns recently expressed by Senator McCain that it may not be practical to subject all DBS providers to "full" must carry requirements.[84] Time Warner Cable does not advocate the wholesale application of must-carry obligations to all DBS service providers. Given the current state of the DBS industry, DBS providers should be free to choose not to carry any local broadcast signals at all, or to retransmit local signals only in those ADIs or DMAs where they believe it makes technical and economic sense to do so. For example, SKY has described its business plan as contemplating retransmission of local broadcast stations only in selected ADIs or DMAs, reaching anywhere from 50% to 75% of U.S. television households. In the remaining markets, SKY does not propose to retransmit any local broadcast stations, but rather will equip subscribers with an off-air antenna and a glorified A/B switch. While Time Warner Cable would be delighted to be freed of must-carry obligations as to 25% to 50% of its customers, Time Warner Cable does not advocate that DBS providers be required to rebroadcast local broadcast signals in every ADI or DMA nationwide. However, once a DBS provider voluntarily chooses to rebroadcast local broadcast stations in a particular ADI/DMA, it is crucial that the DBS provider be required to carry all stations in that ADI/DMA which qualify for carriage under either Section 614 or Section 615 of the Communications Act.

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[83]The direction to adopt must-carry requirements actually appears in a statutory section entitled "Reduced Regulatory Burdens For Open Video Systems," 47 U.S.C. § 573(c).

[84]See Section II.A., *supra*.

Significantly, SKY has not committed itself to carry all local broadcast stations in any given ADI. Indeed, in testimony before Congress, the Chairman of News Corp. indicated only that SKY would carry major network affiliates, at least one PBS station, and "any major independent stations."[85] In other words, SKY is willing to carry the most popular (and strongest) local stations, but is not willing to commit to carriage of the weaker stations, whether commercial or noncommercial, which may serve more specialized audiences. But, as the Supreme Court has recognized, it is precisely those weaker stations which the must carry requirements were designed to protect.[86]

**2. Local TV Station Cross-Ownership.**

Section 76.501(a) of the Commission's rules effectively prohibits any entity from owning or holding an attributable interest in a television broadcast station and a cable television system within the station's Grade B contour.[87] In contrast, no such prohibition applies to DBS, even if a DBS provider elects to carry certain local broadcast signals in an

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[85]Hearing on Multichannel Video Competition, Senate Commerce Committee, Apr. 10, 1997.

[86]Turner Broadcasting, 1997 U.S. LEXIS 2078 at 63, 64 (Must-carry rule found narrowly tailored because it guaranteed carriage of a minority of lesser-watched stations "most of which would be dropped in the absence of must carry," as opposed to the "more popular stations which . . . would be carried anyway."). "Congress was concerned not that broadcast television would disappear in its entirety without must-carry, but that without it, "significant numbers of broadcast stations would be refused carriage on cable systems," and those "broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." Id. at 22-23, quoting Turner I, 512 U.S. at 666 (citations omitted).

[87]47 C.F.R. § 76.501(a). While the 1996 Act deleted a parallel statutory provision, it preserved the prohibition in the Commission's rules, at least pending the Commission's first biennial review. Time Warner Cable opposes the continued application of this rule to cable, but, as explained above, believes that regulatory parity requires the application of this rule to DBS for as long as it remains applicable to cable.

ADI/DMA where it owns a television station. There can be no justification for such anomalous treatment. As long as cable/broadcast cross-ownership remains subject to a prohibition in the Commission's rules, the same prohibition must be applied to DBS providers to the extent that they carry local broadcast signals.

The DBS industry will apparently be marked by extensive cross-ownership of television outlets. News Corp., a parent company of SKY, now holds an attributable interest, through Fox Inc. ("Fox"), in 22 television stations, including stations in 9 of the top 10 television ADIs. These stations reach 40.35 percent of the national television audience, which figure is technically discounted to 34.8 percent, for purposes of the 35 percent national limit, only because of the existing FCC policy to reduce UHF stations' reach by a full 50 percent.[88] Moreover, Fox apparently holds additional interests in two more television group owners, Blackstar L.L.C. and Petracom Holdings, thus further extending its reach.[89] Thus,

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[88]See Application of NWCG Holdings Corp., DA 96-1852, 5 Communications Reg. (P&F) 535 (1996) at ¶¶ 2, 12; Application for Transfer of Control of New World Communications Group Inc., File Nos. BTCCT-960813IC *et al.*, Exhibit G. In short, as the President of Fox's Worldwide Satellite Operations simply stated, "Fox owns and operates stations that cover 40% of U.S. television households." Remarks of Preston Padden, Feb. 24, 1997, Los Angeles, CA at 5.

[89]Petracom's subsidiaries own five TV stations; Blackstar's subsidiaries own four TV stations and one satellite. See "Fox Buys Interest in Group Owner, Petracom Broadcasting," Broadcasting & Cable, May 22, 1995, at 77; and Jan. 30, 1996 Prospectus of Petracom Holdings, Inc. at 43, 66 (with respect to its offer to exchange its 17.5 percent Senior Discount Notes due 2003 (Series B) for its previously privately placed Series A Notes). See also Letter from Roy J. Stewart, Chief, Mass Media Bureau, to Heritage Media, Inc., *et al.*, Ref. No. 1800E4-AL, Re Applications For Transfer of Control of KEVN-TV, Rapid City, SD *et al.*, dated Jan. 18, 1995, at 6; and FCC Ownership Report filed October, 1996 for WBSF-TV, Melbourne, FL, *et al.*, Exhibit B (regarding Blackstar). In addition, Fox has announced plans to acquire Heritage Media Corp., the licensee of seven television stations, which it reportedly plans to sell. Press release, "News Corporation To Acquire Heritage Media Corporation," Mar. 17, 1997.

News Corp. might own one television station in a particular ADI outright, hold a nonvoting interest in the licensee of another television station in the same ADI,[90] and serve that market with multichannel video program service through SKY. In New York City, News Corp. also owns a daily newspaper, the New York Post.[91] A News Corp. subsidiary publishes free standing inserts for Sunday newspapers in numerous cities.[92] News Corp. also publishes TV Guide, a leading source of localized TV program listings nationwide.

Without the imposition of cross-ownership restrictions, DBS service providers with local TV interests will be able to compete unfairly by means of combination advertising rates. For example, a television station might offer a lower rate for an advertiser that also purchases a spot on an affiliated DBS provider or publication. Other television stations or MVPDs that are subject to ownership restrictions would be unable to provide such a discount. Only through the imposition of equivalent regulatory restrictions on cable and DBS service providers can such unfair competition be avoided.

The Commission cannot rationally continue to impose a television cross-ownership ban on cable operators but not on DBS service providers that carry local signals. Indeed, because of the lack of must-carry requirements for such DBS providers, whatever concerns

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[90]Indeed, this is currently the case in the Detroit ADI, where a subsidiary of Fox is the licensee of WJBK-TV, Detroit, and a subsidiary of Blackstar is the licensee of WBSX(TV), Ann Arbor. Time Warner Cable understands, however, that a sale of WBSX is pending.

[91]In addition, it has been reported that News Corp. is considering the acquisition of a 50 percent interest in another New York television station, WBIS(TV). See Daily Variety, Apr. 24, 1997, at 3.

[92]A subsidiary of News Corp. produces more than 60 million inserts for 600 Sunday newspapers weekly. See Press release, "News Corporation To Acquire Heritage Media Corporation," Mar. 17, 1997.

arguably underlie the ban must apply with greater force to DBS. But even if the Commission chooses not to apply an across-the-board ban on DBS provider/local television station cross-ownership, at a very minimum, the Commission must require any DBS provider which holds an attributable interest in a local station, and which elects to carry any local broadcast stations in that ADI, to carry all stations which qualify for carriage in that ADI. In selecting local stations for carriage, a DBS service provider should not be permitted to discriminate in favor of stations in which it holds an ownership interest.

### 3. Network Nonduplication, Syndicated Exclusivity and Sports Blackout.

In addition to the must-carry rules, cable operators are subject to the Commission's syndicated exclusivity ("syndex"), network nonduplication ("non-dup") and sports blackout requirements applicable to the carriage of television broadcast stations. Imposition of these same requirements on DBS providers would serve to protect owners of the intellectual property broadcast by television stations and promote regulatory parity with cable systems.

As detailed above, technological advances will soon allow DBS providers to offer retransmission of television broadcast stations locally. Because DBS providers are also capable of retransmitting broadcast stations to the entire continental U.S., however, DBS providers will also have the ability to retransmit distant broadcasts into local ADIs. If the proposed technology can be successfully implemented, DBS providers will have the ability to retransmit the signals of scores of the major ADI network affiliates, as well as independent stations, into the service areas of small and medium ADI broadcasters.

For example, WBDC is the exclusive broadcast affiliate for The WB Network in the Washington, DC ADI. Certain other WB Network affiliates, such as WPIX from New

York, are widely carried by cable systems as "superstations." However, if a cable operator serving areas within WBDC's protected zone imports WPIX, the Commission's rules entitle WBDC to require the cable operator to delete any duplicated WB Network programming. On the other hand, if a DBS provider were to import WPIX free from non-duplication protection, certain viewers in the Washington D.C. ADI could watch WB Network programming on WPIX, and WBDC would be faced with potential erosion of its audience and advertising revenues. The same problem would be faced by WB Network affiliates across the country, as well as UPN network affiliates due to the importation of distant UPN network affiliates, such as superstation WWOR. Even-handed application of network non-dup is particularly crucial for emerging networks such as The WB and UPN.

Similarly, local broadcast stations, network affiliates and independents alike often bid aggressively for exclusive rights to top-rated syndicated programs such as "Friends," "ER," "The Simpsons" and "Home Improvement." Local broadcasters can protect their investment in such exclusive rights against cable importation of distant signals through the syndex rules. Much in the same way, the sports blackout rules[93] protect local broadcasters and sports teams holding such rights from cable system retransmission of syndicated programming and local sports events, respectively, via distant broadcast signals. There is absolutely no reason why the same protections should not apply in the case of DBS broadcast signal importation, particularly where the DBS provider elects to retransmit local television stations.

Congress has repeatedly cited the importance of local broadcasting and proclaimed the public interest in preserving the viability of such programming. Specifically, the 1992 Cable

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[93]See 47 C.F.R. § 76.67.

Act states that a "primary objective and benefit of our nation's system of regulation of television broadcasting is the local origination of programming."[94] The 1992 Cable Act underscores the importance of local programming, stating that "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcasting services critical to an informed electorate."[95] Likewise, according to the Senate Report from the 1992 Cable Act, "[t]here is no doubt that, over the past 40 years, television broadcasting has provided vital local service through its programming, including its news and public affairs offerings and its emergency broadcasts."[96]

Furthermore, the legislative history of the Satellite Home Viewer Act of 1988 (the "SHVA")[97] indicates Congress' recognition of the public interest in protecting the television broadcast network-local affiliate distribution system, and the importance of protecting local stations' rights to bargain for exclusivity against imported distant broadcast signals. According to the House Committee Report:

> [f]ree local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely. The Committee is concerned that retransmissions of broadcast television service to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of their program contracts could cause

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[94]1992 Cable Act, § 2(a)(10).

[95]Id. at § 2(a)(11).

[96]S. Rep. No. 92, 102d Cong., 1st Sess. 42 (1991).

[97]Pub. L. 100-667, 102 Stat. 3949 (1988).

> an erosion of audiences for such local stations because their programming would no longer be unique and distinctive.[98]

Indeed, Congress' entire stated purpose of the SHVA was to "ensure[] that [DBS equipment] owners will have access to copyrighted programming while protecting the existing network/affiliate distribution system to the extent that it is successful in providing programming by other technologies."[99]

This issue, at least with respect to syndex, has been visited by the Commission in the past. In adopting the SHVA, Congress directed the Commission to adopt rules subjecting satellite carriers to syndicated exclusivity rules similar to the rules governing cable systems if the Commission found that such rules were feasible.[100] Obviously, Congress believed that regulatory parity between cable and DBS was critical to fostering fair competition between these services.

When it addressed this issue six years ago, the Commission found that such rules were not technically feasible based upon the status of the DBS industry at that time. The Commission reasoned that, with the limited number of home satellite dish ("HSD") subscribers at the time, most of which were in rural or unserved areas where syndex would not apply, and the lack of equipment sufficient to delete programming on a national basis, imposition of syndex on satellite carriers was not technically or economically feasible.[101]

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[98]H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 26-27 (1988).

[99]H.R. Rep. No. 887, Part 1, 100th Cong., 2d Sess. 8 (1988).

[100]See 47 U.S.C. § 612.

[101]In re Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers, Report and Order, 6 FCC Rcd 725 (1991) at ¶¶ 13-21.

However, the Commission's rationale was expressly based on the large dish (C-Band) HSD satellite industry that existed at the time, and was acknowledged to be valid only through 1994, when the interim satellite copyright compulsory license was set to expire.[102] Indeed, the Commission acknowledged that the post-1994 home satellite industry and technology was likely to be significantly different, especially with the availability of DBS, so that imposition of syndex in the future could become feasible.[103] Clearly, in 1997, this is now the case. DBS has enjoyed continued growth, and the self-proclaimed technological ability of DBS providers to delete overlapping distant broadcast retransmissions through the use of spot-beam transmissions and digital encryption, combined with Congress' clear intent that exclusivity protection be afforded to local broadcasters, mandates that network non-dup, syndex and sports blackout rules, which all stem from the same policy considerations of protecting bargained-for programming exclusivity, now be imposed on DBS providers electing to retransmit broadcast signals.

These rules are based on the premise that there is value enjoyed by the local broadcaster being able to bargain for and carry certain programming, and that this value is destroyed or significantly diminished if it cannot be carried exclusively. As the Commission observed in reinstituting syndex in 1988:

> Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a significant reason

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[102]Id. at ¶ 13.

[103]Id. at ¶¶ 13, 16.

> for allowing all media the same rights to enter into and enforce exclusive contracts.[104]

Exclusivity is of no less value to local broadcasters with respect to network and sports programming.

Regulatory parity -- treating DBS operators similar to their cable competitors -- is another important reason to adopt these requirements for DBS providers. Indeed, along these lines, the Commission recently applied its syndex, network non-dup and sports blackout rules to OVS, and decided to hold not only OVS programmers but also OVS operators responsible for compliance.[105] With the above-described ability of DBS providers to deliver local signals, there is simply no rational reason not to apply these rules equally to DBS service providers who voluntarily elect to retransmit television broadcast stations.

In sum, the very same concerns that prompted application of these rules to cable systems apply now to DBS retransmission of television broadcast signals. However, if local broadcasters are prohibited from bargaining for exclusivity to prevent DBS operators from retransmitting distant broadcast programming, national, and at best regional, broadcasting will be the rule, and local broadcasting will be the exception. In such a world, the public will be harmed, as it will lose valuable coverage of local events and issues. Moreover, DBS operators will have a distinct regulatory advantage over their cable competitors, directly contrary to Congressional intent. Unless the Commission is willing to abandon the principle

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[104]Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Report and Order, 3 FCC Rcd 5299 (1988) at ¶ 66.

[105]See OVS Second Report and Order, *supra*, at ¶¶ 201-204.

of localism in broadcasting altogether, as well as the principle of regulatory parity, it must impose network non-dup, syndex and sports blackout requirements on DBS providers.

**4. Must-Buy.**

Section 623 of the Communications Act requires that a cable system must offer a basic service tier consisting, at a minimum, of all television broadcast stations carried by the system (except for distant stations imported via satellite) and any PEG access programming required by the system's local franchise.[106] Moreover, the basic service tier must be purchased by all subscribers as a prerequisite to the purchase of any other video programming service.[107] If a DBS provider elects to carry any local broadcast signals, and because Section 335 of the Communications Act mandates a channel capacity set-aside for noncommercial educational or informational programming, the reasons for the creation and mandatory purchase of a basic service tier would be equally compelling for any such DBS provider. The noncommercial programming set-aside obligations of Section 335 are clearly analogous to a cable system's PEG capacity requirements, and the carriage of local signals on one medium or the other has the same effect from the viewer's standpoint. Thus, the creation of a basic service tier and the commensurate subscriber purchase obligation should be applied in any situation where a DBS provider retransmits local broadcast stations.

**C. PEG Access Support Obligations Should Be Imposed On DBS Providers To Advance The Goal Of Localism.**

Section 335 of the Act requires the Commission to "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under

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[106]47 U.S.C. § 543(b)(7).

[107]Id.

this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."[108] Clearly, the technological capacity which allows a DBS provider to retransmit local broadcast signals on a selective market-by-market basis also allows the carriage of other original programming tailored to the needs and interests of particular communities. The 4 to 7 percent channel capacity set-aside, standing alone, will do nothing to foster the creation of additional local programming material. Rather, DBS providers which elect to function as a local outlet through the retransmission of local broadcast stations on a regional or ADI basis should be required to make contributions from their revenues to fund the creation of local educational and informational programming, commensurate with the PEG access support obligations imposed on those local cable operators with which the DBS provider competes.

Under Title IV of the Communications Act, cable television operators can be subjected to significant obligations relating to the provision of PEG access programming. Such obligations generally fall into two categories. First, under Section 611(b), cable operators can be required to designate channel capacity on their systems for PEG access purposes. Second, pursuant to Section 621(a)(4)(B), cable operators can be required to provide adequate financial support for PEG access. PEG access requirements are imposed

[108]47 U.S.C. § 335(a).

on cable operators as part of their public interest obligations as local video programming distributors.[109] As observed by Congress in adopting the 1984 Cable Act:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government work.[110]

Section 25(b)(1) of the 1992 Cable Act, which requires DBS operators to reserve 4 to 7 percent of their channel capacity for public interest programming, is roughly analogous to Section 611 of the Communications Act, pursuant to which cable operators can be required to set aside channel capacity for PEG uses. Indeed, this DBS set-aside requirement roughly approximates cable operators' obligation to set aside capacity for PEG channels. For example, New York City has required municipal channels almost since the beginning of cable services in the City. It awarded cable franchises in 1970 calling for two "City Channels."[111] In amendments to these franchise agreements four years later, the City increased the required number of City Channels to four.[112] Currently, Time Warner

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[109]Time Warner Cable believes such requirements violate the First Amendment by forcing a cable operator to turn over part of its channel capacity to the local government and carry the government's message, without being able to exercise any editorial control. See Turner I, *supra*, 512 U.S. 622, 114 S. Ct. 2445, 2456 (1994) (citing Leathers v. Medlock, 499 U.S. 439, 444, 111 S.Ct. 1438, 1442 (1991)).

[110]H.R. Rep. No. 934, 98th Cong., 2d Sess. 47-48 (1984).

[111]See Contract Between City of New York and Sterling Information Services, Ltd., Aug. 18, 1970, at §§ 1(n), 4(b).

[112]See Contract Between City of New York and Teleprompter Corp., Feb. 28, 1974, at 5.

Cable's PEG set-aside requirement is nine channels each out of 76 total channels in southern Manhattan and 75 total channels in northern Manhattan, or 11.8 percent and 12 percent of total channels, respectively. Considering cable operator PEG access requirements over the years, 7 percent of channel capacity is a reasonable minimum set-aside requirement to impose on DBS providers at this time.

It is critical to recognize, however, that the PEG channel capacity set-aside constitutes only a part of a cable operator's typical public interest obligation with respect to PEG. The most costly and onerous requirements typically fall in the category of PEG access support. Such requirements might be in the form of in-kind contributions, such as the provision of cameras, studio equipment, mobile production vans, modulators, video tape recorders, fully equipped studio facilities, or other equipment which might be used in the production of local PEG access programming. Similarly, such requirements might be in the form of periodic cash payments to be used by local municipal government authorities or other local access organizations to produce PEG access programming.

Time Warner Cable spends millions of dollars and countless work hours per year fulfilling its PEG access support requirements. For example,

- Time Warner Cable's larger systems often must hire a full-time Program Coordinator, at up to $30,000 per year, to implement its PEG access support requirements.

- Many Time Warner Cable systems typically spend hundreds of thousands of dollars in operational costs to cover local council meetings, sports and other local events.

- Time Warner Cable's larger systems typically spend hundreds of thousands of dollars in capital costs to purchase PEG access studio equipment, playback equipment and other facilities necessary to fulfill various local PEG access support obligations.

- One Time Warner Cable system alone, Southern Manhattan, spent over $1.5 million in PEG support, including operations and capital, just in 1996.

- A survey of Time Warner Cable's systems operating in the 25 largest ADIs indicates that Time Warner incurs costs associated with the creation of PEG access and local origination programming in excess of $10 million per year.

Where a DBS provider offers a uniform national service, it may be reasonable for such provider to be subject only to the minimal 7 percent channel capacity set-aside to fulfill its public interest obligations with respect to educational or informational programming, given the current state of development of the DBS industry. However, where a DBS provider voluntarily elects to become a local media outlet, either by retransmitting local broadcast signals in a given ADI/DMA or otherwise tailoring its service offering for specific regions or localities, then such DBS provider clearly should be subject to obligations analogous to a cable operator's PEG access support requirements, over and above the minimal channel capacity set-aside. This is particularly true given Congress' express directive that the Commission explore the opportunities for DBS service providers to advance the overarching goal of localism under the Communications Act. The set-aside of DBS channel capacity will not advance this goal unless DBS providers contribute to the funding for creation of unique local programming not already ubiquitously available over local broadcast television.

The case for applying PEG access requirements to DBS providers becomes more apparent in light of efforts by DBS operators to target local programming, including local television broadcast signals, to subscribers.[113] Once again, since the DBS provider is

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[113]See Cynthia Littleton, "Murdoch, Ergen Take to SKY," Broadcasting & Cable, Mar. 3, 1997, at 41.

acting like a cable operator, offering a localized package of programming to individual communities, it should be required to fulfill the corresponding local obligations to each community, chief among which is financial support for PEG access. If DBS providers are going to beam local programming to selected regions, PEG access requirements would ensure that such programming is "responsive to the needs of the local community."[114]

As noted above, the Commission's OVS rules clearly illustrate how competing similar services should be treated with regulatory parity. OVS operators are subject to numerous Title VI provisions, including PEG access.[115] Quite obviously, Congress believed that OVS' status as a competitor to cable must be accompanied by a level of regulatory parity with cable. There is no reason why DBS providers who voluntarily seek to become local outlets via carriage of local broadcast signals should be treated differently with regard to the obligation to provide support for the creation of local PEG access programming.

In fact, the OVS model provides a workable model for DBS PEG access requirements. Specifically, the Commission's OVS rules provide that, where an OVS operator and the relevant local franchising authority do not agree on the terms of the OVS operator's direct provision of PEG access to the community, the OVS operator must satisfy the same PEG access obligations as the local cable operator. Similarly, a DBS provider that elects to carry local programming should have PEG access support obligations similar or identical to those imposed upon the local cable operator. As with OVS, the DBS provider should be required to negotiate with the local franchising authority for PEG access

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[114]See Time Warner Cable of New York City *et al.* v. City of New York, 96 Civ. 7736 (DLC) (S.D.N.Y. Nov. 6, 1996), *supra*, at 13.

[115]47 U.S.C. § 573(c)(1)(B).